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STATE OF MICHIGAN
IN THE SUPREME COURT
ON APPEAL FROM THE COURT OF APPEALS
(Saad, Cavanagh and Donofrio, J.J) and (Hoekstra, Griffin and Borrello, J.J.)

JOHN R. JACOBS,

Plaintiff-Appellee,

v

TECHNIDISC, INC, and PRODUCER'S COLOR SERVICES, INC.,

Defendants-Appellees,

and

MICHIGAN MUTUAL INSURANCE COMPANY, n/k/a AMERISURE MUTUAL INSURANCE COMPANY,

Intervenor-Appellant.

SUPREME COURT
No.: 128715

COURT OF APPEALS
No.: 258271

OAKLAND CIRCUIT COURT
No.: 91-405664-NO

MARCIA VAN TIL,

Plaintiff-Appellant,

v

ENVIRONMENTAL RESOURCES MANAGEMENT, INC.,

Defendant-Appellee,

/

(To Be Argued With)

SUPREME COURT
No.: 128283

COURT OF APPEALS
No.: 250539

OTTAWA CIRCUIT COURT
No.: 02-42717-NO

BRIEF ON APPEAL OF INTERVENOR-APPELLANT DIRECTOR OF THE WORKERS' COMPENSATION AGENCY

ORAL ARGUMENT REQUESTED

Michael A. Cox
Attorney General

Thomas L. Casey (P24215)
Solicitor General
Counsel of Record

Rose A. Houk (P15156)
Assistant Attorney General

Victoria A. Keating (P36890)
Assistant Attorney General

Attorneys for Intervenor-Appellant, Director of the Workers' Compensation Agency
Cadillac Place
3030 West Grand Blvd. – Suite 10-161
Detroit, Michigan 48202
(313) 456-0080

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II. If this Court does overrule *Sewell,* should the decision be applicable only to new cases and cases that are currently pending, and not to cases that have been decided and are final?

STATEMENT OF PROCEEDINGS AND FACTS

I. *Jacobs v Technidisc, Inc, and Producer's Color Services, Inc., and Michigan Mutual Insurance Company, n/k/a Amerisure Mutual Insurance Company.*

The Director adopts Intervenor-Appellant Michigan Mutual's Statement of Facts, set out on pages 1-4 of its brief, and adds the following:

In the consent judgment entered in the *Jacobs* case by the Oakland County Circuit Court December 8, 1993, the final paragraph reads as follows:

> IT IS FURTHER ORDERED AND ADJUDGED that, subsequent to the entry of this Consent Judgment, Plaintiff, John R. Jacobs shall receive future worker's compensation benefits in the amount of Two Hundred Eleven dollars [$211.00] per week for a period of eight hundred forty-three [843] weeks and shall thereafter be paid the full weekly amount of worker's compensation benefits as required by the Worker's Disability Compensation Act, MCLA 418.401 et seq., by Michigan Mutual Insurance Co. [Emphasis added]

The circuit court judge cited an incorrect, inappropriate portion of the Act in his Consent Judgment. MCL 418.401 *et seq*. deals with occupational diseases and disablements, and does not address specific event injuries like Mr. Jacobs's, or benefits, or benefit rates.

II. *VanTil v Environmental Resources Management, Inc.*

Marcia VanTil sustained chemical burns while removing wax from the floors of a building owned by defendant. She filed a tort case in circuit court, seeking damages. Defendant countered with the argument that Ms. VanTil was an employee, and that therefore her remedy was worker's compensation, and not a personal injury action in tort. The circuit court proceeded to apply and interpret the Worker's Disability Compensation Act, made a determination that Ms. VanTil was an employee of ERM, and granted defendant's motion for summary disposition under MCR 2.116(C)(4), lack of subject matter jurisdiction. It is the Director's position that the

circuit court did not have jurisdiction to engage in interpretation of the Worker's Disability Compensation Act at all. The circuit court should have sent the case to the Worker's Compensation Agency for the determination as to Ms. VanTil's employment status.

III. Director's Interest

The Director has moved to intervene in these matters pursuant to the Act, which provides that the Director may be an interested party in all workers' compensation cases in questions of law. MCL 418.841(1).

The Director will not address the issue of Mr. Jacobs' worker's compensation rate, or the question of Ms. VanTil's status at ERM. The Director will address only the jurisdictional issues raised in these consolidated cases.

ARGUMENT

I. The Legislature enacted MCL 418.101 *et seq.*, the "Worker's Disability Compensation Act of 1969," to deal with all aspects of employment injury issues. MCL 418.841(1) specifically addresses jurisdiction, and states that, "any dispute or controversy concerning compensation or other benefits shall be submitted to the bureau and all questions arising under this act shall be determined by the bureau or a worker's compensation magistrate, as applicable." The issues presented in these cases about compensation benefits and employment status clearly arise under the Act, and are covered by specific statutes set out in the Act. The Worker's Compensation Agency has exclusive jurisdiction to decide these employment-related questions.

A. Standard of Review

Subject matter jurisdiction involves questions of law regarding the interpretation of statutes and court rules. Questions of law are reviewed *de novo.*[1]

The issue of subject matter jurisdiction - the power of a court to determine a cause or matter - can be raised at any time, by the parties, or by a court.[2]

B. Discussion

Subject matter jurisdiction is statutory, arising through law enacted by the Legislature. It cannot be conferred upon a court by the parties' consent or waiver.[3]

Subject matter jurisdiction in worker's compensation matters was carefully spelled out by the Legislature in MCL 418.841(1) of the Worker's Disability Compensation Act:

> Any dispute or controversy concerning compensation or other benefits shall be submitted to the bureau and all questions arising under this act shall be

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[1] *Cain v Waste Mgt, Inc (After Remand)*, 472 Mich 236; 697 NW2d 130 (2005).

[2] *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608, 630; 684 NW2d 800 (2004); MCR 2.116(D)(3).

[3] *Lehman v Lehman*, 312 Mich 102, 106; 19 NW2d 502 (1945); *In re: Hatcher*, 443 Mich 426, 433; 505 NW2d 834 (1993); *In re: Estate of Fraser*, 288 Mich 392, 394; 285 NW 1 (1939).

determined by the bureau or a worker's compensation magistrate, as applicable. [Emphasis added]

The statute is clear. The Workers' Compensation Agency[4] has exclusive jurisdiction over all questions related to employment issues covered by the WDCA. The decision in *Sewell v Clearing Machine Corp,*[5] holding that circuit courts have concurrent jurisdiction in worker's compensation matters, should be overturned.

The Director adopts and incorporates by reference Argument I set out at pages 6-31 of the brief filed by Intervenor-Appellant Michigan Mutual Insurance Company in *Jacobs v Technidisc, Inc. and Producer's Color Services, Inc,* with the exception of the suggestion in its brief at fn 13 that this Court should *sua sponte* take up the issue presented in *Franges Motors Corporation.*[6] In addition, the Director states the following:

The Worker's Disability Compensation Act is a detailed set of statutes, specifically designed to deal with workplace injuries. Its purpose and history are described in this Court's decision in *Cain v Waste Mgt. Inc*[7]*:*

> When, in special session, the Legislature in 1912 passed that first act, known as Michigan's "Workmen's Compensation Act," it was the culmination of the efforts of the five-person Employers' Liability and Workmen's Compensation Commission appointed by Governor Chase S. Osborn in 1911. The commission had been formed because of what was described at the time as "wide dissatisfaction" with the employer's liability at common law for injuries suffered by his employees. Report of the Employers' Liability and Workmen's Compensation Commission of the State of Michigan, 5 (1911) (Report). The

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[4] The "Worker's Compensation Agency" is the current name for the state agency administering worker's compensation in Michigan. The Agency was previously known as the "Bureau of Worker's Compensation." The name was changed by Executive Order 2003-18.

[5] *Sewell v Clearing Machine Corp,* 419 Mich 56; 347 NW2d 447 (1984).

[6] *Franges Motor Corporation v GMC,* 404 Mich 590; 274 NW2d 392 (1979).

[7] *Cain,* 472 Mich at 247-248 (Citations omitted; footnotes omitted).

> commission was directed to "investigate and report a plan for legislative action to provide compensation for accidental injuries or death arising out of and in the course of employment. . . ." *Id.* In its report, the commission, after concluding that the existing negligence-based system (1) failed to sufficiently encourage prevention of accidents, (2) did not protect employers against excessive verdicts, (3) resulted in inadequate compensation for injured workers, and (4) engendered animosity and strife, recommended a statute based on similar provisions already enacted in Massachusetts, Wisconsin, and New Jersey. The Legislature, with very few changes to the recommended language, briskly enacted this proposal as Michigan's workmen's compensation act less than three weeks after the bill was introduced. 1912 (1st Ex Sess) Journal of the House 13, 149-150.

In 1975, the Legislature re-named the Act, changing it from "Workmen's Compensation Act of 1969" to the "Worker's Disability Compensation Act of 1969," to acknowledge the many women in the workforce. Through the years, with the various adaptations, the purpose of the Act remained the same – to provide employees compensation for work-related injuries, regardless of fault. In exchange for "this almost automatic liability, employees are limited in the amount of compensation they may collect from their employer, and, except in limited circumstances, may not bring a tort action against the employer."[8] It is a special system, with a special purpose.

The worker's compensation system is less formal than circuit court. The claimant need only file a simple one-page petition to bring his or her case into the system. Detailed complicated pleadings are not required. There is no formal discovery. Mediation is without charge or sanctions – intended only to help resolve the cases. There are no jury trials; the cases are heard by magistrates. Resolution of the case is typically relatively swift. An *in pro per* claimant can pursue a case without an attorney in the worker's compensation system. Benefit rates are set out in weekly benefit tables, according to the year of injury and the average weekly wage on the injury date. It is a relatively simple, manageable system.

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[8] *Clark v United Technologies Automotive, Inc,* 459 Mich 681, 687; 594 NW2d 447 (1999).

The Worker's Compensation Agency deals only with worker's compensation issues, and the interpretation and application of the Worker's Disability Compensation Act. This, of course, results in a high level of expertise in this area of the law. The magistrates, and the Director, decide hundreds of cases a year. To be eligible for appointment, worker's compensation magistrates must have at least five years' experience in worker's compensation law, or pass a written test on the statutes governing worker's compensation.

The magistrates hear only worker's compensation cases, day in and day out. Circuit court judges, on the other hand, are rarely presented with a worker's compensation issue. In her dissent in *Reed v Yackell*, Justice Corrigan explained why the expertise of the Worker's Compensation Agency is so important, and why the decision in *Sewell v Clearing Machine Corp* should be overturned:[9]

> This court has acknowledged that administrative agencies possess "superior knowledge and expertise in addressing recurring issues within the scope of their authority." *Travelers Ins Co v Detroit Edison Co*, 465 Mich 185, 200; 631 NW2d 733 (2001). In *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691, 702 n 5; 614 NW2d 607 (2000), this Court explained that the Legislature created a "two-tier reviewing process, which delegates to the WCAC the role of ultimate factfinder, while limiting the judiciary to the role of guardian of procedural fairness." *Mudel* correctly recognized that
>
> > administrative agencies possess expertise in particular areas of specialization. Because the judiciary has neither the expertise nor the resources to engage in a fact-intensive review of the entire administrative record, that type of detailed review is generally delegated to the administrative body. In the particular context of worker's compensation cases, a highly technical area of law, the judiciary lacks the expertise necessary to reach well-grounded factual conclusions. . . . The judiciary is not more qualified to reach well-grounded factual conclusions in this arena than the administrative specialists. Therefore, the Legislature has decided that factual determinations are properly made at the administrative level, as opposed to the judicial level. [*Id.*]

[9] Re*ed v Yackell*, 473 Mich 520, 556-558; 703 NW2d 58 (2005) (Emphasis in original).

> The rationale underlying this Court's decision in *Sewell* is that resolving the legal question regarding a plaintiff's employment status is not an issue that requires agency expertise. The instant case, however, belies that understanding. Here, three courts have interpreted the same facts three different ways in deciding plaintiff's employment status. . . .
>
> This case itself reflects that the legal question regarding the employment status of an injured party for WDCA purposes can be a complicated and highly fact-driven question. For that reason, employment status is best determined first by the administrative agency legislatively charged with applying the WDCA.
>
> Even if the legislature had not clearly directed that *all* questions regarding application of the WDCA be answered within the worker's compensation system, the pre-*Sewell* approach simply works best. Allowing the agency to decide first which tribunal has jurisdiction over a claim in which the WDCA is implicated maximizes the strengths of both tribunals. The WCB may apply its expertise to resolve issues of fact in the employment context, while courts, of course, retain appellate review of WCB decisions and resolve questions of law.

An example of the problems a lack of expertise can cause is illustrated in the Consent Judgment issued by the circuit court December 8, 1993 in the *Jacobs* case. The document states that:

> IT IS FURTHER ORDERED AND ADJUDGED that, subsequent to the entry of this Consent Judgment, Plaintiff, John R. Jacobs shall receive future worker's compensation benefits in the amount of Two Hundred Eleven dollars [$211.00] per week for a period of eight hundred forty-three [843] weeks and shall thereafter be paid the full weekly amount of worker's compensation benefits as required by the Worker's Disability Compensation Act, MCLA 418.401 et. seq., by Michigan Mutual Insurance Co.

MCL 418.401 *et seq.* deals with occupational diseases and disablements, and does not address specific event injuries like Mr. Jacobs's. Further, § 401, *et seq.* does not mention benefits at all.

In *VanTil v ERM* the circuit court found that Ms. VanTil was an employee of ERM. In making that determination, the circuit court interpreted the provisions of the WDCA that deal with the circumstances when a person is to be deemed an "employee." The definitions are set out in great detail in numerous sub-sections under § 161 of the Act. The issue of Ms. VanTil's

status should have been decided by the Worker's Compensation Agency, as mandated by § 841(1).

Michigan courts have long appreciated the value of the expertise of the Worker's Compensation Agency, and acknowledged its exclusive jurisdiction over interpretation of the provisions of the WDCA.[10] In *Szydlowski*, a leading case on jurisdiction in worker's compensation cases, this Court reversed the Court of Appeals' holding that the circuit court had concurrent jurisdiction with the worker's compensation bureau, finding that the lower court had issued[11]:

> a clearly erroneous conclusion. In *Solakis v Roberts*, 395 Mich 13, 20; 233 NW2d 1 (1975), we said that when "an employee's injury is within the scope of the act, workmen's compensation benefits are the exclusive remedy against the employer. MCLA 418.131 . . ." MCLA 418.841 . . . provides that "all questions arising under this act shall be determined by the bureau."
>
> The circuit court complaint said plaintiff's husband was a GM employee who received injuries in the course of his employment. Defendant was said to have a statutory duty to provide medical service. This claim is based upon a section of the compensation act. MCLA 418.315 . . . The complaint concerned matters for the Workmen's Compensation Bureau, not for the circuit court.

Citing *Herman v Theis*, the *Szydlowski* Court acknowledged that "the procedures for workmen's compensation cases have been statutorily established,"[12] according the worker's compensation system exclusive jurisdiction over matters that arise under the Act.

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[10] *Jesionowski v Allied Products Corp*, 329 Mich 209; 45 NW2d 39 (1950);
Morris v Ford Motor Co, 320 Mich 372; 31 NW2d 89 (1948);
Dershowitz v Ford Motor Co, 327 Mich 386; 41 NW2d 900 (1950);
Herman v Theis, 10 Mich App 684; 160 NW2d 365 (1968);
Buschbacher v Great Lakes Steel Corp, 114 Mich App 833; 319 NW2d 691 (1982);
Dixon v Sype, 92 Mich App 144; 284 NW2d 514 (1979); and
Szydlowski v General Motors Corp, 397 Mich 356, 359; 245 NW2d 26 (1976).

[11] *Szydlowski,* 397 Mich at 358.

[12] *Szydlowski,* 397 Mich at 359.

The decision in *Sewell v Clearing Machine Corp* was an aberration from the long history of cases interpreting the law of worker's compensation. In concluding that the circuit court and the worker's compensation bureau had concurrent jurisdiction to decide whether a person was an "employee" as defined under the Worker's Disability Compensation Act, the *Sewell* decision overrode the law as enacted by the Legislature, and the many decisions acknowledging the exclusive jurisdiction granted to the Worker's Compensation Agency.

The Act, taken as a whole, clearly shows that the Legislature intended that worker's compensation issues were to be decided within the workers' compensation system. This was addressed in Justice Corrigan's analysis in *Reed v Yackell*[13]:

> The WDCA sets up comprehensive procedures for resolving disputes "arising under" the act. For example, MCL 418.847(1) provides that a "party in interest" may apply for a hearing before a worker's compensation magistrate. MCL 418.847(2) provides that a magistrate must file a written order and "a concise written opinion stating his or her reasoning for the order including any findings of fact and conclusions of law."
>
> MCL 418.859a and 418.861a establish the procedures a party must follow in order to appeal a magistrate's decision within the WCB. MCL 418.859a provides that "a claim for review of a case for which an application under section 847 is filed . . . shall be filed with the appellate commission." MCL 418.861a(1) provides that any claim for review filed pursuant to section 859a "shall be heard and decided by the appellate commission [WCAC]." During that process, the WCAC may "remand [the] matter to a worker's compensation magistrate for purposes of supplying a complete record if it is determined that the record is insufficient for purposes of review." MCL 418.861a(12)
>
> Judicial review of magistrate and WCAC decisions is circumscribed under the WDCA. MCL 418.861 provides:
>
> > The findings of fact made by the board acting within its powers, in the absence of fraud, shall be conclusive. The court of appeals and the supreme court shall have power to review questions of law involved in any final order of the board, if application is made by

[13] *Reed,* 473 Mich at 550-552 (Corrigan, J., dissenting) (Italics in original; underline emphasis added).

> the aggrieved party within 30 days after such order by any method permissible under the rules of the courts of the laws of this state.

MCL 418.861a(14) similarly provides:

> The findings of fact made by the commission acting within its powers, in the absence of fraud, shall be conclusive. The court of appeals and the supreme court shall have the power to review questions of law involved with any final order of the commission, if application is made by the aggrieved party within 30 days after the order by any method permissible under the Michigan court rules.

Significantly, the WDCA sets up no substantive right to or procedural mechanism for circuit court resolution or review of legal or factual questions regarding application of the WDCA. On the contrary, as noted earlier, in MCL 418.841, the Legislature directed that "[a]ny *dispute* or controversy concerning compensation or other benefits shall be submitted to the bureau and *all questions* arising under this act shall be determined by the bureau or a worker's compensation magistrate. . . ." (Emphasis supplied)

Where, as here, the employment status of an injured plaintiff is in dispute, the issue is whether that dispute is one "arising under" the WDCA. If the dispute over employment status is not one "arising under" the WDCA, then MCL 418.841 does not preclude a circuit court from exercising jurisdiction over that determination. Conversely, if the dispute over employment status *is* a question "arising under" the WDCA, then a circuit court lacks subject-matter jurisdiction over those initial determinations by virtue of the Legislature's direction in MCL 418.841(1) that "all" such questions "*shall* be determined by the bureau or a worker's compensation magistrate. . . ." (Emphasis supplied.) The Legislature's use of the word "shall" in a statute "indicates a mandatory and imperative directive" *Burton v Reed City Hosp Corp*, 471 Mich 745, 752; 691 NW2d 424 (2005).

There are two specific exceptions to the exclusive jurisdiction of the Workers' Compensation Agency over work-related issues. MCL 418.131(1) states that when "an employee is injured as a result of a deliberate act of the employer and the employer specifically intended an injury," then the remedy is a tort action, which would be filed in circuit court. The second exception is set out in MCL 418.827(1), which states that:

> [w]here the injury for which compensation is payable under this act was caused under circumstances creating a legal liability in some person other than a natural

> person in the same employ or the employer to pay damages in respect thereof, the acceptance of compensation benefits or the taking of proceedings to enforce compensation payments shall not act as an election of remedies but the injured employee or his or her dependents or personal representative may also proceed to enforce the liability of the third party for damages in accordance with this section. [Emphasis added]

Sections 827 (2)-(8) describe in detail how this is to be done, what the employee may recover against the third party, and how expenses are to be paid and allocated. Nothing in Section 827 gives the circuit court jurisdiction over the worker's compensation issues in the case. It could not, as this would be in conflict with the clear language of Section 841(1), which mandates exclusive jurisdiction over worker's compensation issues with the Worker's Compensation Agency.

Sewell ignored the mandate of §841(1). In *Reed v Yackell*, the majority opinion acknowledged the problems with the *Sewell* decision, but stated that precedent should not be lightly overruled – noting that, though the jurisdictional issue in *Reed* was raised in the amicus brief filed on behalf of the State Bar of Michigan, the parties themselves had not raised or briefed the issue. "As we have made clear in the past, "[w]e do not lightly overrule precedent. Indeed, in *Robinson v Detroit,* 462 Mich 439, 464; 613 NW2d 307 (2000), we discussed several factors to consider before overruling a prior decision."[14] The criteria for overruling a precedent are explained in *Robinson*[15]:

> Courts have cited numerous factors to consider before overruling a prior case. For example, *Helvering v Hallock*, 309 US 106, 119; 60 S Ct 444; 84 L Ed 604 (1940), states:
>
> > *[S]tare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and

[14] *Reed,* 473 Mich at 539.

[15] *Robinson v City of Detroit,* 462 Mich 439, 464-466; 613 NW2d 307 (2000) (Citations omitted; footnotes omitted).

> questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience.
>
> We must also recognize that stare decisis is a "principle of policy" rather than "an inexorable command," and that the Court is not constrained to follow precedent when governing decisions are unworkable or are badly reasoned.
>
> Further, as Justice Powell stated concurring in *Mitchell v W T Grant Co*, 416 US 600, 627-628; 92 S Ct 1895; 40 L Ed 2d 406 (1974), "[i]t is thus not only our prerogative but also our duty to re-examine a precedent where its reasoning or understanding of the Constitution is fairly called into question."
>
> Courts should also review whether the decision at issue defies "practical workability," whether reliance interests would work an undue hardship, and whether changes in the law or facts no longer justify the questioned decision. . . .
>
> The first, question, of course, should be whether the earlier decision was wrongly decided. . . .
>
> However, as this discussion makes clear, the mere fact that an earlier case was wrongly decided does not mean overruling it is invariably appropriate. Rather, the court must proceed on to examine the effects of overruling, including most importantly the effect on reliance interests and whether overruling would work an undue hardship because of that reliance.
>
> * * *
>
> As to the reliance interest, the Court must ask whether the previous decision has become so embedded, so accepted, so fundamental, to everyone's expectations that to change it would produce not just readjustments, but practical real-world dislocations. It is in practice a prudential judgment for a court.

Application of the *Robinson* criteria to the decision in *Sewell* supports overruling *Sewell.* In *Reed,* the majority acknowledged that the *Sewell* decision was "decided peremptorily without plenary consideration, briefing, or argument."[16] And in terms of practical, real-world ramifications, if the Worker's Compensation Agency has exclusive jurisdiction over issues

[16] *Reed,* 473 Mich at 539.

regarding the Worker's Disability Compensation Act, everything is easier. There is a clear process for deciding these issues, not competing forums.

As Intervenor-Appellant Amerisure points out at page 30 of its brief, practical problems arise under the *Sewell* holding. With concurrent jurisdiction, claims could be filed in the same case in both circuit court and with the Worker's Compensation Agency. Each forum could rule on the worker's compensation issues raised, and disagree.

Sewell should be overturned. In this regard, the Director adopts and incorporates by reference the arguments presented by the Workers' Compensation Law Section of the State Bar of Michigan. As argued in both *VanTil* by the Workers' Compensation Law Section and in *Jacobs* by Intervenor-Appellant, Amerisure, keeping exclusive jurisdiction with the Worker's Compensation Agency to decide worker's compensation issues ensures consistency. This, too, was addressed in Justice Corrigan's dissent in *Reed*[17]:

> The goal of consistent and uniform administrative decision-making is similarly thwarted where multiple forums may decide the same factual question. As we stated in *Travelers, supra* at 199:
>
> > "[U]niformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure." [Citation omitted.]
>
> Resort to the WCB in the first instance ensures that employment status issues will be resolved in a consistent manner.
>
> Moreover, the shared jurisdiction approach established by *Sewell* suffers from an unconvincing rationale and lack of clarity in application. As Justice LEVIN aptly opined, there is little reason to assume that employment status determinations are any "more fundamental" than other questions involved in determining whether a

[17] *Reed*, 473 Mich at 558-559 (Corrigan, J., dissenting).

> plaintiff's claim sounds in worker's compensation or tort. *Sewell*, supra at 70 (LEVIN, J., concurring). Thus, *Sewell's* "more fundamental" rationale for concurrent jurisdiction appears both unprincipled and groundless.

The Legislature did not authorize circuit courts to decide worker's compensation issues. It authorized the Worker's Compensation Agency to do that. The *Sewell* decision is simply wrong. The vast majority of cases involving work-related issues are decided by the Worker's Compensation Agency. *Sewell* created a parallel illegitimate forum for worker's compensation issues. The *Sewell* decision has not become so accepted or fundamental to society's expectations that overruling it would produce significant problems. As the *Robinson* Court noted, *stare decisis* is not an inexorable command, and the Court is not forced to follow precedent "when governing decisions are unworkable or are badly reasoned."[18] Overruling *Sewell* would solve problems, not create them.

The parties in the *Jacobs* and *VanTil* cases who support concurrent jurisdiction of the circuit court and the Worker's Compensation Agency argue that because the WDCA does not specifically prohibit circuit court jurisdiction, concurrent jurisdiction exists. For example, the appellee in the *VanTil* case, at page 7 of its brief, cites the Michigan Constitution, specifically Const. 1963, Art. 6 § 13, which states that, "[t]he circuit courts shall have original jurisdiction in all matters not prohibited by law." (Emphasis added.)

Const. 1963, Art. 6 § 13 does not support concurrent jurisdiction in regard to worker's compensation issues. As stated, MCL 418.841(1) states specifically that "[a]ny dispute or controversy concerning compensation or other benefits shall be submitted to the bureau and all questions arising under this act shall be determined by the bureau or a worker's compensation

[18] *Robinson,* 462 Mich at 464.

magistrate, as applicable." (Emphasis added) This is the policy adopted by the Legislature – and it prohibits any other forum from deciding worker's compensation issues. The only exceptions are specifically spelled out in MCL 418.131(1) and MCL 418.827.

Section 131(1) applies if an employer has injured an employee deliberately, i.e., committed a tort. Section 827 applies if a third party has liability as a result of the work injury – but in that case, the Agency would still have exclusive jurisdiction over any employer-employee issues. Neither §131(1) or §827 affects the exclusive jurisdiction of the Agency over employer-employee-related issues.

Appellee ERM also cites MCL 600.605 as support for its argument that the circuit court has concurrent jurisdiction in worker's compensation matters. MCL 600.605 reads as follows:

> Circuit courts have original jurisdiction to hear and determine all civil claims and remedies, except where exclusive jurisdiction is given in the constitution or by statute to some other court or where the circuit courts are denied jurisdiction by the constitution or statutes of this state. [Emphasis added]

In fact, MCL 600.605 does not support circuit court jurisdiction over worker's compensation issues. To the contrary. As stated, MCL 418.841(1) confers exclusive jurisdiction over worker's compensation matters to the Worker's Compensation Agency. The Legislature made that clear – "all questions arising under this act shall be determined by the bureau or a worker's compensation magistrate, as applicable." It was not necessary for the Legislature to say anything further. Appellee ERM's argument on pages 8-9 of its brief that there must be a "clear mandate" to "divest" jurisdiction from circuit court does not stand up under examination. The circuit court was never granted general jurisdiction over worker's compensation matters – so it is not a matter of divestiture. Jurisdiction was never there in the first place.

Appellee ERM also claims that the decision in *Wikman v City of Novi*,[19] supports its argument regarding "divestment." It does not. *Wikman* is a tax case, and involved a 1974 change in the tax law regarding jurisdiction over challenges to municipal special assessments. The question was whether a claim for injunctive relief removed the case from the tribunal's exclusive jurisdiction.

The Court concluded that it did not, and that the statute gave the tax tribunal exclusive jurisdiction, noting that in the past there had been concurrently available remedies under the prior law. "The proliferation of these available remedies created problems of forum shopping and increased the possibility of inconsistent decisions. These problems led to the passage of the Tax Tribunal Act with its provisions for exclusive jurisdiction."[20] (Emphasis added.) The Tax Tribunal Act, at MCL 205.774, stated that "[t]he right to sue any agency for refund of any taxes other than by proceedings before the tribunal is abolished."

This is not at all like the situation with the Worker's Disability Compensation Act. The Legislature never gave the circuit court jurisdiction to decide worker's compensation matters. There was no need to "divest" its jurisdiction.

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[19] *Wikman v City of Novi*, 413 Mich 617, 645; 322 NW2d 103 (1982).

[20] *Wikman,* 413 Mich at 628-629.

II. If this Court does overrule *Sewell,* the decision should only be applicable to new cases and cases that are currently pending and not to cases that have been decided and are final.

A. Standard of Review

Subject matter jurisdiction involves questions of law regarding the interpretation of statutes and court rules. Questions of law are reviewed *de novo*.[21]

B. Discussion

The Director adopts and incorporates by reference the brief filed by Amicus Curiae Workers' Compensation Law Section of the State Bar of Michigan. In particular, the Director adopts the suggested procedure of how a case would be handled if *Sewell* is overruled. Only new cases and those cases that are currently pending should be subject to the application of new rule, which, as indicated by the Workers' Compensation Law Section, is really the "old" rule established in *Szydlowki.*

In addition, and in response to the unasked question in *Reed,*[22] regarding how and when the issue of the Agency's jurisdiction should be addressed, the Director would adopt the position of Justice Levin in *Sewell*[23]:

> Where a claim for compensation is pending or could yet be filed, [16] a court may or should refrain from deciding a question that may also "arise under" the act and defer to the bureau as the body designated by statute to make the decision. But unless a compensation claim is pending or could yet be filed, there can be neither a "controversy concerning compensation" nor a "question arising under this act."

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[21] *Cain,* 472 Mich at 236.

[22] *Reed,* 473 Mich at 539.

[23] *Sewell,* 419 Mich at 71 (Footnote omitted).

Adopting this approach should allay the concerns expressed by Justice Corrigan in her dissent in *Reed*[24] about the Court's usurpation of legislative power and the erasure of almost fifty years of precedent in which this Court and the Court of Appeals had consistently held that courts lack jurisdiction to determine the employment status of a party to litigation before a court. Moreover, holding a matter that has been filed in circuit court in abeyance, pending a decision by another tribunal, is not a new concept for circuit courts. It may occur if an interlocutory appeal is filed in the appellate courts, by the circuit court's own order or by an order of an appellate court, MCR 7.209; it may occur if a party in the action seeks protection in bankruptcy court and the matter is subject to the automatic stay provisions of the Bankruptcy Code.[25] It can and should have occurred in the matters under consideration here and the Director would encourage, and respectfully asks, this Court to follow this procedure.

CONCLUSION

MCL 418.841(1) of the Worker's Disability Compensation Act provides that "[a]ny dispute or controversy concerning compensation or other benefits shall be submitted to the bureau and all questions arising under this act shall be determined by the bureau or a worker's compensation magistrate, as applicable." (Emphasis added)

The statute is clear. The Worker's Compensation Agency has exclusive jurisdiction over all questions related to employment issues covered by the WDCA. The decision in *Sewell,* granting circuit courts concurrent jurisdiction in worker's compensation matters, should be overturned.

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[24] *Reed,* 473 Mich at 554-555 (Corrigan, J., dissenting).

[25] 28 USC § 362.

In the *Jacobs* case, the circuit court had jurisdiction over the tort case, under MCL 418.827(1). But it should have referred the rate issue to the Worker's Compensation Agency. If that had been done at the outset of the case, years of litigation would have been avoided.

In *VanTil*, the basic issue of Ms. VanTil's status at ERM should have been decided by the Worker's Compensation Agency. It should not have been decided by a circuit court interpreting the provisions of the WDCA. MCL 418.841(1). As suggested by Amicus Curiae Workers' Compensation Law Section of the State Bar of Michigan, the *VanTil* matter should be referred to the Workers' Compensation Agency and a magistrate for the determination of Ms. VanTil's status. This is not as farfetched as it seems and was the standard procedure followed prior to *Sewell.* It was also the procedure recommended and ordered by the Court of Appeals in *Sewell.*

The fact that the jurisdiction of the circuit court was not challenged initially makes no difference. The issue of subject matter jurisdiction -- the power of a court to determine a cause or matter -- can be raised at any time, by the parties, or by a court including this court.[26] As Justice Corrigan opined in *Reed,*[27] the pre-*Sewell* approach simply worked best because allowing the Workers' Compensation Agency to determine which tribunal has jurisdiction over a claim in which the WDCA is implicated strengthens both tribunals; the WCA applies its expertise to resolve fact issues, and the courts retain appellate review and resolve questions of law. Such a division provides for uniform and consistent decisions concerning employment status issues with no opportunity for the same facts to be interpreted in multiple ways as was done in *Reed* and in *VanTil.* The "old rule" and procedure in effect in *Szydlowski* follows the

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[26] *Reed,* 473 Mich at 546-547 (Corrigan, J., dissenting); *Nat'l Wildlife Federation,* 471 Mich at 608, 630; MCR 2.116(D)(3).

[27] *Reed,* 473 Mich at 558 (Corrigan, J., dissenting).

statutory dictates of the WDCA and is an appropriate way to resolve the conflicts presented in these cases.

RELIEF SOUGHT

The Director asks this Court to overturn the decision in *Sewell* and to adopt the pre-*Sewell* approach to the determination of subject matter jurisdiction approved by this Court in *Szydlowski*, which acknowledges the exclusive jurisdiction of the Worker's Compensation Agency to decide worker's compensation issues.

Respectfully submitted,

Michael A. Cox
Attorney General

Thomas L. Casey (P24215)
Solicitor General
Counsel of Record

Rose A. Houk (P15156)
Assistant Attorney General

Rose A. Houk for

Victoria A. Keating (P36890)
Assistant Attorney General
Attorneys for Intervenor-Appellant
Director of the Workers' Compensation Agency
3030 West Grand Blvd. – Suite 10-161
Detroit, Michigan 48202
(313) 456-0080

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